

Ecology asks Washington court to reconsider water ruling

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The Washington Department of Ecology has asked the state Supreme Court to reconsider a decision that restricts ecology's ability to redistribute water.

OLYMPIA — The Washington Department of Ecology has asked the state Supreme Court to reconsider a ruling that rebuked the agency for rearranging water rights based on what it considered to be an overriding public interest.

DOE argues the 6-3 decision last month undermines its ability to allocate scarce water to benefit the public. In this case, DOE authorized the city of Yelm in Western Washington to draw more groundwater to accommodate population growth.

The court scotched the plan because it would have put surrounding rivers and creeks at risk of occasionally falling below state-mandated minimum flows, a water right senior to Yelm's new right.

The Supreme Court has not decided whether to reconsider, a court official said Tuesday.

A lawyer for Thurston County landowner Sara Foster, who sued to stop the water redistribution, said the court has not asked him to respond to DOE's written argument for reconsideration. "I think the decision was well reasoned and legally sound," attorney Patrick Williams said.

Although the decision did not directly involve an agricultural water right, the case sets an important precedent for farmers with senior water rights, said Toni Meacham, executive director of the Washington State Agricultural Legal Foundation.

DOE overreached and impaired a senior water right, said Meacham, who is not representing any party in the case. "They went ahead and rationalized it with that concept of 'overriding considerations of public interest,'" she said.

DOE's appeal for reconsideration hinges on whether DOE can permanently redistribute water withdrawals in the public interest at the expense of stream flows. Minimum stream flows are meant to protect fish, wildlife, recreation, scenery, navigation and livestock watering.

The court's majority ruled that such withdrawals could only be temporary, an interpretation that dissenting judges called "novel and unprecedented."

The suit did not challenge DOE's authority to temporarily transfer water rights in a drought emergency.

The court rejected DOE's contention that potential damage caused by low flows could be more than made up for with riverbank projects.

DOE and Yelm maintain that depriving the city of more water will encourage the proliferation of residential groundwater wells, spurring urban sprawl and sucking more water from streams.

Foster received support from the Center for Environmental Law & Policy, which praised the ruling as an affirmation of DOE's obligation to protect in-stream flows.

Some Washington farmers last summer faced rare drought-driven irrigation water cutbacks because of minimum-flow rules.

In the Foster case, Meacham said DOE acted alone to reorder water rights. "That, to me, is a huge red flag," she said. "If agriculture needs more water, then ask for a change of law."